COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Keyspan Energy Delivery New England	**)**	**D.T.E. 02-18**

INITIAL BRIEF OF THE

MASSACHUSETTS DIVISION OF ENERGY RESOURCES

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I. INTRODUCTION AND PROCEDURAL HISTORY

On March 22, 2002, Keyspan Energy Delivery New England ("Keyspan") filed a Petition for approval of three firm gas transportation contracts executed by and between Keyspan and the Algonquin Gas Transmission Company ("Algonquin"). The Department of Telecommunications and Energy (the "Department") convened a public hearing and procedural conference on April 17, 2002. The Attorney General's Office intervened as of right and the Massachusetts Division of Energy Resources ("DOER") submitted a motion to intervene out of time. The Department granted DOER's intervention motion on May 14, 2002, the same day as conducting the evidentiary hearing on the merits of the Petition.

II. ARGUMENT

A. Keyspan's Failure to Engage in Discussions with Marketers Prior to Executing the Contracts with Algonquin Undercut the Effectiveness of the Upstream Capacity Planning Process

On June 13, 2001 and July 26, 2001, Keyspan executed three contracts for firm gas transportation and negotiated rate by and between Boston Gas Company d/b/a/ Keyspan Energy Delivery New England and Algonquin and Colonial Gas Company d/b/a/ Keyspan Energy Delivery New England. Keyspan did not consult or discuss the contracts with marketers prior to execution of the contracts. Tr. at 67 – 70. Keyspan's failure to work cooperatively with marketers, to the extent that Keyspan failed to provide notice or to engage in discussions with marketers prior to executing the contracts, flies in the face of D.T.E. 98-32-B, the Natural Gas Unbundling Order issued by the Department on February 1, 1999.

On July 18, 1997, the Department directed the ten investor-owned natural gas local

distribution companies ("LDCs") to initiate an industry-wide collaborative process in order to develop a set of common principles for the comprehensive unbundling of services by the Commonwealth's natural gas industry. D.T.E. 98-32-B at 1. Keyspan participated vigorously in all aspects of the proceeding. D.T.E. 98-32-B at 2.

The Department's goals for the proceeding were to: (1) provide the broadest possible customer choice; (2) provide all customers with an opportunity to share in the benefits of increased competition; (3) ensure full and fair competition in the gas supply market; (4) provide functional separation between sale of gas as a commodity and local distribution service; (5) support and further the goals of environmental regulation; and (6) rely on incentive regulation where a fully competitive market did not yet exist. D.T.E. 98-32-B at 3.

The Department found, in formulating D.T.E. 99-32-B, that the level of competition in the upstream capacity market was insufficient to eliminate traditional regulatory controls. That being the case, the Department directed the LDCs to continue "… with their obligation to plan for and procure sufficient upstream capacity." D.T.E. 99-32-B at 23. The Department found the following facts to be integral to the planning process for upstream capacity:

> [t]he LDCs must continue in their obligation to plan for and procure necessary upstream capacity to serve all firm customers. LDCs would recontract for capacity, on an as-needed basis, subject to the approval of the Department. Although the management of capacity resources may be turned over by some LDCs to the wholesale market… decisions regarding the renewal of expiring contracts must be made by the LDCs, in accordance with their obligation to serve. **These renewal decisions should be preceded by discussions with marketers in order to assure that the LDCs' decisions will take into account customer migration to transportation service, system growth, and the trend of marketer participation in the LDCs' markets.** Ibid. at 34.

It is undisputed that Keyspan initiated no discussions with marketers nor did Keyspan provide the required notice prior to the execution of the three contracts with Algonquin.[1] Tr. at 67 – 68. It is also undisputed that Keyspan was aware of these obligations and knew they had the force of regulation.[2]

The Department has clearly determined that marketers play a significant role in securing capacity by the LDCs. Marketers bring to the table their own insights into potential customer migration and, going forward, necessary capacity. Cutting the marketers out of the process, in contravention of D.T.E. 98-32-B, per force has a negative impact upon customer choice and impedes expansion of the competitive market.

B. Keyspan's Eight Month Delay In Submitting the Contracts to the Department Deprived Customers of the Protection Afforded by the Department's Review

Keyspan has an obligation to provide reliable, least-cost gas to customers. The Department has an obligation to determine whether the contracts entered into by Keyspan are in the public interest. Keyspan did not fulfill its obligation, with the ineluctable consequence that

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1 In response to RR-D.T.E. – 3, Keyspan provides a response as to its notice obligations that, at best, is disingenuous. Keyspan asserts that it complied with the affirmative notice requirements of the Model Terms and Conditions, Section 13.2.2. It is apparently Keyspan's position that, even though the contracts were negotiated and executed prior to any notice being provided, Keyspan had in fact satisfied its notice obligations. Keyspan tries to argue for the first time, after the hearing, that the effective date for contract performance was the relevant event for triggering a notice obligation, not the renegotiations. It is axiomatic that "affirmative notice" means notice of an event before it occurs; notice at a point in time when the comments or input from a third party would offer substantive value, not when the gas goes into the pipeline.

2 In accordance with 220 CMR 1.10 (2) DOER requests that the Department take Official Notice of correspondence maintained as part of the Administrative Record of D.T,.E. 98-32-B; specifically, a letter dated November 3, 1999, written by Robert J. Keegan, Esq. to the Secretary, Mary Cottrell. Mr. Keegan explains, on the first page, third paragraph, the importance and authority of the Model Terms and Conditions laid out in D.T.E. 98-32:

> . . . [t]he LDCs view these terms and conditions as establishing the business rules and practices that will govern the way in which LDCs will interact with competitive suppliers and achieve coordination of their

customers were denied the benefit and the protection afforded by the Department's oversight and review of these contracts.

M.G.L. c. 164, § 94A proscribes the entry into a contract for gas or electricity without the approval of the Department. The Department's supervisory authority pursuant to c. 164,§ 94A, as well as c. 164, § 76, is sufficiently broad so as to give the Department discretion to make any order concerning these contracts it find operate in the public interest. However, in this case, as a practical matter, the value of the Department's review, delayed by Keyspan for over eight months, has been greatly reduced. The submission of the three contracts at this late date is more of a procedural nicety than it is statutory compliance. Such behavior is antithetical to the benefit of customers and limits the Department's ultimate authority over these contracts.

respective operations.

III. CONCLUSION

DOER believes that, overall, the contracts entered into by and between Keyspan and Alginquin were appropriate. Not withstanding, based on the facts of this case, DOER requests that the Department:

1. Find, as a matter of law, that local gas distribution companies are required to provide notice and engage in discussions with marketers prior to executing firm contracts;

2. Find, as a matter of law, that local gas distribution companies are required to submit firm contracts for the Department's approval in accordance with G. L. c. 164, §94A; and

3. Condition approval of the instant contracts to be effective only after review by the Department.

Respectfully submitted,

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